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PP v. MUHAMMAD SHAHMIZAL AZIZAN & ORS

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID J
[CRIMINAL TRIAL NO: PA-45C-2-11-2018]
22 JUNE 2022

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Abstract – *In drafting a charge under s. 3(1) of the Kidnapping Act 1961, it is incumbent upon the prosecution to state with clarity which of the acts constituting the act of kidnapping under the provision ie, whether it was abduction, wrongful confinement or wrongful restraint, that the prosecution wishes to rely on in proving its case against the accused. The failure to state which of those acts would result in the charge being defective and a nullity. Where there is such omission in the charge, it is not open to the prosecution to choose to prove any of those acts in the course of the trial.*

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CRIMINAL PROCEDURE: *Charge – Defective charge – Accused persons charged for kidnapping – Common intention – Charge failed to state which of acts constituting act of kidnapping under s. 3(1) of Kidnapping Act 1961 that prosecution intended to rely on in proving case against accused persons – Whether abduction, wrongful confinement or wrongful restraint – Whether charge defective and nullity – Whether curable under ss. 156 and 422 of Criminal Procedure Code – Whether open to prosecution to choose to prove any of acts in course of trial*

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The six accused persons were charged for the kidnapping of one Bangladeshi citizen ('victim'), an offence under s. 3(1) of the Kidnapping Act 1961 ('Act'), read together with s. 34 of the Penal Code. The prosecution's narration unveiled that, on the fateful day, the victim was resting in the sleeping quarters of a construction site when the second and third accused persons came and introduced themselves as immigration officers. They then requested for the victim's passport but the victim handed his immigration papers instead. The third accused proceeded to handcuff the victim and took the latter to a waiting car where he was made to sit at the back passenger seat with the fourth and fifth accused persons. The third accused drove to an oil palm and left the fourth and fifth accused persons there, together with the victim, where they met the sixth accused at a house. There, the fourth accused demanded for a payment of RM50,000 and when the victim said he did not have such amount, he was assaulted. The next day, the victim contacted his father, asking for the reduced amount of RM22,000 to be paid. The victim's father paid 50,000 Thaka into an account in Bangladesh, which was provided by the fifth accused. The victim was later taken to a shop lot before he was rescued by the police. During trial, the questions that arose for determination were (i) whether in drafting a charge under s. 3(1) of the Act, it was obligatory on the prosecution to state with clarity which of the

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acts constituting the act of kidnapping under the provision, *ie*, whether it was abduction, wrongful confinement or wrongful restraint, that the prosecution intended to rely on in proving its case against all the accused persons; (ii) whether a failure to state which of those acts under s. 3(1) of the Act would result in the charge being defective and a nullity; and (iii) whether in a situation where there is an omission in stating in the charge the particular act constituting the offence of kidnapping under s. 3(1) of the Act, it is open to the prosecution to choose to prove any of those acts in the course of the trial.

Held (discharging and acquitting accused persons):

(1) It is clear from s. 3(1) of the Act that there are three distinct acts which, if committed with the intent to hold any person for ransom, would amount to an offence of kidnapping under the Act. Section 2 of the Act provides that each of these acts shall have meanings assigned to each of them in ss. 339, 340 and 362 of the PC. However, in drafting the charge, the prosecution did not state whether the kidnapping was committed by way of abduction, wrongful confinement or wrongful restraint. (paras 20 & 21)

(2) The prosecution failed to state in the charge an ingredient of the offence of kidnapping under s. 3(1) of the Act when it failed to specify which of the acts provided under the said provision that the prosecution intended to prove against all the accused persons. It was not available to the prosecution to merely name the offence without describing specifically the act that all the accused persons were accused of committing. Any one of the three distinct and separate acts of kidnapping expressly stated in s. 3(1) of the Act is an essential ingredient in proving the offence of kidnapping. It was not open to the prosecution to choose and prove the relevant act in the course of the trial. (para 36)

(3) The charge was defective and a nullity. Sections 156 and 422 of the Criminal Procedure Code could not aid the prosecution as this was not a situation where there was an error in stating the offence or the particulars required to be stated in a charge. The omission went to the root of the charge. The accused persons were entitled to take advantage of the prosecution's failure at the end of the prosecution's case. (paras 36 & 37)

Case(s) referred to:

Ab Malek Atan v. PP [2002] 6 CLJ 405 HC ***(dist)***
Dhivyaprabu Panir Selvam v. PP [2022] 1 LNS 1088 CA ***(refd)***
Fan Yew Teng v. PP [1975] 1 LNS 38 FC ***(dist)***
Goh Keat Peng v. PP [2001] 2 CLJ 498 HC ***(refd)***
Jeffri Abdullah & Ors v. PP [2015] 6 CLJ 438 CA ***(dist)***
Karpal Singh Ram Singh v. PP & Another Appeal [2016] 8 CLJ 15 CA ***(dist)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
PP v. Mohamad Sabu [2017] 7 CLJ 214 HC ***(refd)***

PP v. Mohd Zhafri Abu Baker [2021] 1 LNS 727 HC ***(foll)***
PP v. Uthaya Kumar Ponnusamy & Ors [2011] 1 CLJ 360 HC ***(refd)***
Ravindran Ramasamy v. PP [2015] 3 CLJ 421 FC ***(refd)***
Saw Tuan Cheong v. PP [1946] 1 LNS 31 PC ***(refd)***
Sundar Subramaniam lwn. PP & Satu Lagi Rayuan [2018] 1 LNS 1854 CA ***(dist)***
Uthayakumar Ponnusamy v. PP [2003] 2 CLJ 549 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 156, 180(1), (4), 422
Evidence Act 1950, s. 114(a)
Kidnapping Act 1961, ss. 2, 3(1)
Penal Code, ss. 34, 300, 339, 340, 362, 375, 499, 506
Police Act 1967, s. 27(5)
Sedition Act 1948, ss. 3(1), 4

For the prosecution - Yasinnisa Begam Seeni Mohideen & Rais Imran Hamid; DPPs
For the 1st, 2nd & 3rd accused - Saiful Ambar Abdullah Ambar; M/s Ambar & Azah
For the 4th accused - Anbanathan; M/s Anba
For the 5th accused - Muhammad Arif Shaharuddin; M/s Mohd Irwan Mohd Mubarak
For the 6th accused - Benjamin Tan; M/s Lim Tan & Co

Reported by Najib Tamby

JUDGMENT

Mohd Radzi Abdul Hamid J:

Introduction

[1] All the accused were charged with an offence of kidnapping one Bangladeshi citizen by the name of Taiful Islam (Bangladesh Passport No: BP0706172) ('victim') under s. 3(1) of the Kidnapping Act 1961 ('Act') read together with s. 34 of the Penal Code ('PC') on common intention.

[2] The charge ('charge') read as follows:

> Bahawa kamu bersama-sama pada 21 Jun 2018 jam lebih kurang 10.45 malam di kawasan tapak pembinaan perumahan Bertam Perdana berdekatan Jalan Persiaran Perdana 1, Bertam Perdana, Kepala Batas, di dalam daerah Seberang Perai Utara, di dalam negeri Pulau Pinang, bagi meneruskan niat bersama kamu semua, bagi maksud mendapatkan wang tebusan sebanyak lebih kurang Bangladeshi Thaka 400 ribu telah menahan seorang lelaki warganegara Bangladesh bernama Taiful Islam nombor paspot, BP0706172 dengan cara melarikan dan menghalang secara salah Taiful Islam nombor paspot BP0706172 dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 3 Akta Culik 1961 dan boleh dihukum di bawah seksyen yang sama dan dibaca bersama dengan seksyen 34 Kanun Keseksaan.

Brief Facts

[3] It was the prosecution's case that on 21 June 2018 whilst the victim (PW6) and his friend, PW7 were resting in a container sleeping quarters at a construction site in Bertam, Seberang Perai Utara, Penang, the second and

third accused came to the container and knocked on the door ('first location'). They both claimed to be immigration officers and requested to be shown both the victim's and PW7's passports. Since they did not have their passports with them, they handed over their immigration papers instead. The second accused confiscated PW7's mobile phone and the third accused then handcuffed the victim.

[4] Both the second and third accused then took the victim out of the container to a waiting car. Before leaving the container, the victim saw the first accused standing outside and looking towards inside the container. When the victim was taken to the car, he was directed to sit at the back passenger seat where the fourth and fifth accused sat on his either side. The third accused then drove the car leaving the area with the second accused seated in the front passenger seat. The third accused drove the car to an oil palm estate at Lot 2545 Ladang Felda, Gunung Bongsu, Kpg Selarong, Karangan, Kedah ('second location') and left the fourth and fifth accused together with victim. Both the accused then brought the victim still handcuffed to a house in the estate where they met the sixth accused. It was the sixth accused who provided temporary use of the house. It was revealed in the course of the trial that it was the first accused who had made the request to the sixth accused to allow use of the house at the second location.

[5] At the house, the fourth accused made a demand for the payment of RM50,000 from the victim. When the victim said that he did not have such amount of money, the fourth accused hit the victim with a piece of rattan and then placed a parang on the victim's neck found whilst demanding a reduced amount of RM22,000 to be paid in Bangladesh. The next day the victim contacted his father using the fifth accused's mobile phone and asked for the RM22,000 to be paid as demanded by the fourth accused. There was a delay in the payment and the victim was then assaulted by the fifth accused. At the request of the fifth accused, the victim then contacted his father again at which time the father heard the victim being assaulted by the fourth accused over the phone. The victim's father then contacted the fifth accused and a sum of 50,000 Thaka was paid into a bKash account in Bangladesh provided by the fifth accused.

[6] After the payment was made, both the fourth and fifth accused then took the victim to an unnumbered shop lot at Kampung Batu 10, Kampung Terap, Serdang, Kedah ('third location'). They were brought to the third location by a car but the victim could not remember who drove that car. The victim was then rescued by PW14 and his team of police officers on 24 June 2018 at approximately 12.15am. When he was rescued, the victim was found locked in a room together with the fifth accused whilst the fourth accused was on guard outside the premises. The fourth accused attempted to escape but was captured by the police.

[7] The victim identified all the accused at the trial.

A **Submissions At End Of Prosecution's Case**

Submissions By The Prosecution

[8] Learned Deputy Public Prosecutor submitted that the prosecution had proven a *prima facie* case against each of the accused based upon: (i) the fact
B that the victim was wrongfully confined was clearly established by the evidence of the victim, PW7 and PW14; (ii) the evidence showed that the victim was wrongfully confined by the second, third, fourth and fifth accused beginning from the first location, then at the second location and finally at the third location; (iii) the evidence of the victim showed that the wrongful
C confinement was for the payment of ransom; (iv) there was a demand for ransom by the fourth and fifth accused and that demand was made by use of force; (v) a ransom in the amount of 50,000 Thaka was paid in Bangladesh to a bKash account provided by the fifth accused; (vi) the possession of two mobile phones belonging to the victim and PW7 which were found in the possession of the fourth accused raised the presumption under s. 114(a)
D of the Evidence Act 1950 of his involvement in the crime; (vii) there was positive identification of all the accused at the identification parade and at the trial; (viii) DNA evidence from cigarette butts found at the second location (exhs. P14 and P34) placed the fifth accused there; (ix) an adverse inference that the fourth accused was involved in the crime could be drawn
E against him when he was arrested after attempting to flee the third location; and (x) the overall evidence showed that each of the accused had played their respective roles in the kidnapping of the victim, where: (a) the first accused sought the help of the sixth accused to allow the fourth and fifth accused and the victim to spend the night at the second location; (b) the first accused gave
F information to the police on the second location; (c) the second and third accused abducted the victim and drove the victim together with the fourth and fifth accused to the second location; (d) the second accused took PW7's mobile phone and that phone found its way to the fourth accused; (e) access to the second location was given by the sixth accused; and finally (f) the roles
G of the fourth and fifth accused who were present at all the locations, who kept the victim confined and who made the demand for ransom. Based on those facts, all the accused had the common intention as provided under s. 34 of the PC to commit the crime of kidnapping against the victim.

Submissions For The First Second And Third Accused

H **[9]** It was submitted for the first, second and third accused that, *inter alia*: (i) there was a doubt as to the actual identity of the victim as there was no valid identification papers confirming his identity apart from an alleged photocopy of his passport; (ii) there was a doubt whether the container area at the first location was sufficiently lit to enable the victim to positively
I identify the first, second and third accused; (iii) there was a doubt whether the identification parade process was fairly carried out; (iv) contradictions between the victim's identification of the first and third accused at the

identification parade (exhs. P29 and P30) and his oral evidence at the trial where at the identification parade the victim had identified the first accused as the person who drove the car to the second location when at the trial he identified the first accused as the person who was standing outside the container; and (v) the prosecution failed to prove that a demand for ransom was made and that there was a failure by PW16 as the Investigating Officer to ascertain whether the ransom was in fact paid.

Submissions For The Fourth Accused

[10] It was submitted for the fourth accused that, *inter alia*: (i) there was a failure by the prosecution to state in the charge which limb or act in s. 3(1) of the Act that is abduction or wrongful confinement or wrongful restraint, the prosecution was relying on in proving the offence against the accused and that resulted in the charge being defective under the Criminal Procedure Code ('CPC'); (ii) the accused was prejudiced by that failure; and (iii) there was a doubt on whether the demand was made for ransom or for a repayment of debt as the victim had admitted in cross-examination that he owed monies to both the accused.

Submissions For The Fifth Accused

[11] It was submitted for the fifth accused that, *inter alia*: (i) the victim's oral evidence was inconsistent and therefore unreliable; (ii) there was a failure by the prosecution, as similarly contended by learned counsel for the fourth accused, to prove under which act in s. 3(1) of the Act was the offence of kidnapping committed; (iii) the victim was never actually wrongfully confined at the third location as the victim was found sleeping together with the fifth accused which meant that he was not in any way threatened and held against his will; (iv) there was doubt as to whether the bruises found on the victim's wrists were actually caused by handcuffs put on by the accused or by the police as the victim was also handcuffed after the raid by the police at the third location; and (v) the oral testimony and witness statement (exh. WSP4) of PW4 (doctor) who had examined the victim after he was rescued was unreliable since his evidence was not corroborated by medical reports or photographic evidence.

Submissions For The Sixth Accused

[12] It was submitted for the sixth accused that, *inter alia*: (i) there was no evidence that the sixth accused had a role in the commission of the crime apart from just permitting the use of the second location at the request of the first accused; (ii) the victim agreed under cross-examination that the sixth accused was not involved neither in his abduction nor was he involved in assaulting him; (iii) PW16 admitted that in his statement to the police the first accused had asked for the sixth accused to just allow some friends to stay at the second location; and (iv) there was no evidence showing that the sixth accused had knowledge that the second location would be used to wrongfully confine the victim.

Further Submissions Specifically Relating To The Issue Of The Validity Of The Charge

[13] It was submitted by learned Deputy Public Prosecutor that a general reference to the offence of kidnapping without particularly stating in the charge which particular act under s. 3(1) of the Act the prosecution intended to rely on in proving the offence of kidnapping was sufficient to describe the offence and did not render the charge defective and a nullity and, in any event, curable under s. 156 and 422 of the CPC. Reference was made to the decision in *Saw Tuan Cheong v. PP* [1946] 1 LNS 31; [1946] 1 MLJ 143 which held that the omission in adding particulars to the charge did not render the charge defective and is curable under s. 156 of the CPC. In the course of submissions learned Deputy Public Prosecutor submitted that the acts described under s. 3(1) of the Act are just particulars of the charge and need not be specifically stated. Notwithstanding that it was not stated in the charge, it was further contended that it was open to the prosecution to prove which act of kidnapping that it was relying in the course of the trial, which in this trial was wrongful confinement. Reference was also made to the Court of Appeal decision in *Sundar Subramaniam lwn. PP & Satu Lagi Rayuan* [2018] 1 LNS 1854; [2018] MLJU 1748 where the charge there was crafted in the same fashion as the charge in this trial and since the Court of Appeal found no issue with how the charge was drafted then the same should be held in this case.

[14] In opposing that argument, it was submitted by learned counsel for the fourth accused (whose argument on this issue was also for the benefit of all the other accused) that based on the Federal Court decision in *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421; [2015] 6 MLJ 509, a failure or omission in stating the ingredients of the offence left the charge defective and incurable under ss. 156 and 422 of the CPC. Reliance was further made on the recent decision of the High Court in *PP v. Mohd Zhafri Abu Baker* [2021] 1 LNS 727; [2021] MLJU 817 where it was held that the failure of the prosecution to clearly state in the charge which of the acts under s. 3(1) of the Act it intended to rely on specifically in proving its case rendered the charge defective and had prejudiced the accused persons.

Court's Duty At The End Of The Prosecution's Case

[15] At the end of prosecution, this court has to consider whether the prosecution has succeeded in establishing a *prima facie* case against the accused. This is provided for under s. 180(1) of the CPC. Pursuant to s. 180(4) of the CPC, a *prima facie* case is established when credible evidence is adduced by the prosecution to prove each and every ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[16] In the oft-quoted decision of the Federal Court in *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1, the test with regard to evaluation of evidence at the close of prosecution was set out:

> [25] The test at the end of the prosecution's case is '*prima facie* case' based on a maximum evaluation of evidence. The evidence has to be scrutinised properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a *prima facie* case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.

[17] A *prima facie* case is simply one that is sufficient for the accused to be called upon to answer. The evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen.

Issues

[18] After considering all the submissions and arguments put forth by the respective parties, this court found that there was one very material issue that was fundamental to this trial and this related to the issue of validity of the charge. That issue brought to rise the following questions:

(i) whether in drafting a charge under s. 3(1) of the Act, it was obligatory on the prosecution to state with clarity which of the acts constituting the act of kidnapping under the provision that is abduction or wrongful confinement or wrongful restrain, the prosecution intended to rely on in proving its case against all the accused;

(ii) whether a failure to state which of those acts under s. 3(1) of the Act resulted in the charge being defective and a nullity; and finally,

(iii) whether in the situation where there was an omission in stating in the charge the particular act constituting the offence of kidnapping under s. 3(1) of the Act, it was open to the prosecution to choose to prove any of that act in the course of the trial.

Deliberations And Analysis

[19] To start off this court's deliberations on those questions, it would be necessary to first revisit s. 3(1) of the Act the charge. Section 3(1) of the Act provides:

> Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping.

[20] It is clear from that provision there are three distinct Acts which if committed with the intent to hold any person for ransom will amount to an offence of kidnapping under the Act. Section 2 of the Act provides that each

of these acts shall have meanings assigned to each of them in ss. 339, 340 and 362 of the PC. For the sake of brevity, the meanings for each of these acts are reproduced below:

Section 339 – Wrongful restraint

Whoever voluntarily obstructs any person, so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Section 340 – Wrongful confinement

Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.

Section 362 – Abduction

Whoever by force compels or by any deceitful means induces any person to go from any place, is said to abduct that person.

[21] Now, referring to the charge, it is quite clear that in drafting it the prosecution only stated that on 21 June 2018, each of the accused had towards achieving the common intention of demanding ransom in the amount of 400,000 Thaka, kidnapped the victim but did not state whether the kidnapping was either by way of abduction or wrongful confinement or wrongful restrain.

[22] In determining whether an omission by the prosecution to state in the charge the specific act of kidnapping under s. 3(1) of the Act rendered the charge defective and a nullity, it would be imperative to first determine whether those acts are ingredients of the offence or just particulars of a charge. In endeavouring to arrive at that determination, this court will refer to and discuss a number of decisions which in this court's view are relevant and instructive. Those cases are *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421; [2015[6 MLJ 509; *Goh Keat Peng v. PP* [2001] 2 CLJ 498; [2001] 3 MLJ 172; *Uthayakumar Ponnusamy v. PP* [2003] 2 CLJ 549; [2003] 5 MLJ 433; *Karpal Singh Ram Singh v. PP & Another Appeal* [2016] 8 CLJ 15; [2016] MLJU 1675 COA; *Fan Yew Teng v. PP* [1975] 1 LNS 38; [1975] 2 MLJ 235; *PP v. Mohamad Sabu* [2017] 7 CLJ 214; [2017] MLJU 399; *Ab Malek Atan v. PP* [2002] 6 CLJ 405; [2002] 4 MLJ 84; *PP v. Mohd Zhafri Abu Baker* [2021] 1 LNS 727; [2021] MLJU 817; *Jeffri Abdullah & Ors v. PP* [2015] 6 CLJ 438; [2015] 6 MLJ 824 and *Sundar Subramaniam lwn. PP & Satu Lagi Rayuan* [2018] 1 LNS 1854; [2018] MLJU 1748 COA.

[23] Reference is first made to the Supreme Court decision in *Ravindran Ramasamy v. PP* (*supra*) where the Supreme Court had the occasion to discuss the differences between the ingredients of an offence and particulars of a charge. Jeffry Tan FCJ speaking for the court stated:

[27] Pursuant to s. 156 of the CPC, 'no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission' (the Indian equivalent, s. 215 of the Indian Criminal Procedure Code, ends with the words 'and it has occasioned a failure of justice'). However, in view of s. 422, for an error or omission to be material, it is not enough that the accused has been misled; there must also be a failure of justice. 'Whether any court should apply s. 422 aforesaid will depend, among other things, on whether the irregularity involves the breach of a principle of general importance to the administration of criminal justice. If it does, the court would not apply s. 422, as this appears to us to be the same thing as the irregularity having occasioned a failure of justice' (*Yap Sing Hock & Anor v. Public Prosecutor* [1992] 2 MLJ 714 at p. 725 per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court).

[28] It could also be noted that the 'error' alluded to in s. 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge, and not the error in stating the ingredients of an offence. That important distinction, whether an error in stating the particulars or an error in stating the ingredients, must be drawn for the purposes of ss. 156 and/or 422 of the CPC. This is because where it was an error or omission in stating the ingredients of an offence, it had been consistently held by the courts that the accused would have been misled and that there must have been a failure of justice. *Low Seng Wah v. Public Prosecutor* [1962] 1 MLJ 107, was the exceptional case, where Neal J held that the omission of an essential ingredient in the charge was not fatal, because of the unique provisions of s. 321 of the CPC (since repealed) which provided that 'No judgment, sentence or order of magistrate court shall be reversed or set aside unless it is shown to the satisfaction of the court of a judge that such judgment, sentence or order was either wrong in law or against the weight of the evidence'. *Low Seng Wah v. Public Prosecutor*, which was primarily decided under s. 321, is no precedent on s. 156 of the CPC.

[29] But in cases decided primarily under ss. 156 and/or 422 of the CPC, courts had refused to invoke those provisions where it was an error or omission in stating the ingredients of an offence.

[30] In *Public Prosecutor v. Mahfar bin Sairan* [2000] 4 MLJ 791, Kang Hwee Gee J, as he then was, drew attention to the vast difference between the ingredients of an offence as opposed to the particulars of the act, and the need to distinguish between the ingredients of an offence and its mere particulars: Steven A Hirsch, in an article entitled '*Yap Sing Hock v. PP: Time for a quick and Decent Burial*' [1993] 3 MLJ Lexis, draws a distinction between the elements (or what is more commonly described in courts as ingredients and mere particulars and pointed out that a charge is bad only where the element specified therein had prejudiced the accused under the fair notice rule. He wrote at p. Ixxvii of his article which he fortified by reference to numerous case decisions, which I have no reason to doubt as correctly representing the law: The court failed to appreciate that every criminal charge contain two distinct types of averment: (i) a recitation of

A or reference to the elements (or 'ingredients') of the underlying statutory offence; and (ii) particulars which are not themselves elements of the underlying offence but which 'flesh out' the details of the allege crime. The first sort of averment, as the court correctly pointed out, is subject to the rule of strict construction in favour of liberty.

B **[24]** In *Uthayakumar Ponnusamy* (*supra*), Suriyadi J (as he then was) held that the charge under s. 506 of the PC was defective due to a failure by the prosecution to state under which limb of the provision the offence of intimidation was committed:

A close scrutiny of s. 506 will reveal that there are two sets or limbs of
C intimidation, namely simple intimidation or a more serious version where, among others, the threat to life or property is involved. The latter naturally carries a heavier sentence. A semi colon delineates the two sets. Regretfully, the charge against the applicant had failed to identify under which limb or set he was charged with, as it merely ingrained that he had committed an offence under s. 506. As the charge had not clarified
D whether the threat was to cause death, grievous hurt, destruction of property by fire, or to cause an offence punishable with death or imprisonment, then in the minimum, the applicant was being charged for the lighter limb (first). Regardless of my construction, it is cold comfort for the applicant, as that uncertainty will not assist him when preparing his case. It cannot be overstated that a charge must be certain in all cases,
E as otherwise an accused person will be left guessing, and prejudicially embarrassed not knowing what he had [2003] 5 MLJ 433 at 446 contravened or how to counter the allegations (*Public Prosecutor v. Teoh Choon Teck* [1963] MLJ 34; *Yoh Meng Heng v. Public Prosecutor* [1970] 1 MLJ 14). Hashim Yeop A Sani J, as he then was, in *Public Prosecutor v. Yap Kok Meng* [1974] 1 MLJ 108 had remarked at p. 109:

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> It is fundamental in the system of justice as we know it that a person accused of a criminal offence must be informed clearly of the charge against him. It is a fundamental rule that an allegation must be stated with sufficient precision to enable the accused to meet the allegation and properly prepare his defence.

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Under s. 503 of the Penal Code, to qualify even as a simple criminal intimidation (under the first limb), not only must there be the *actus reus*, in the like of injuring a person, his reputation or property, or to the person or reputation of anyone in whom that person is interested, but also the *mens rea*. The latter will be in the form of intent to cause alarm to that
H person, or to cause that person to do any act which he is not legally bound to do, etc. In other words, to fall within the ambit of this section, regardless of the limb under which an accused is charged, both legal ingredients must be present.

[25] In *Goh Keat Peng* (*supra*), the High Court held that the charge in that
I case was defective as the charge did not state specifically which of the offences under s. 27(5) of the Police Act 1967 applied against the accused:

... it is also my finding that the said charge is defective on the ground that it does not comply with the requirement of s. 152(3) of the CPC. The said charge failed to state clearly and specifically which of the offences provided under s. 27(5) of the Act the applicant had been charged with. Section 152(3) of the CPC provides, *inter alia*, as follows:

> ... so much of the definition of the offence must be stated so as to give the accused notice of the matter with which he is charged.

...

In the present case before this court, it is found that the words used in the charge framed are very wide in their terms and the applicant could not know which of the 15 offences under s. 27(5) of the Act as hereinbefore classified is said to have been committed by the applicant. In the circumstances, the applicant will be prejudiced in the preparation of his defence and that the applicant will not be able to know whether the provisions of ss. 27(5A), (5B) and/or (5C) of the Act would apply to his case. It has to be expressed here that an accused person on trial in the interest of justice must be made to fully and truly understand the nature of the charge he is asked to plead to. On this point, I only need to restate what has been said by His Lordship KC Vohrah J in the case of *PP v. Margarita B Cruz* [1988] 1 MLJ 539 at p. 539 as follows:

> It behoves all magistrates and presidents to scrutinise the charges, to read the provision of the statute under which the charge is framed, to understand the constituent ingredients of the charge, to know the nature of punishment and appreciate the gravity of the charge.

if the charge is defective or badly framed, the magistrate should point out the defects and request the prosecuting officer to amend the charge as the accused should truly understand the nature of the charge he is asked to plead to.

[26] In *Karpal Singh Ram Singh* (*supra*), the Court of Appeal had to decide whether the charge was defective due to a failure by the prosecution to state in the charge the seditious tendencies under s. 3(1) of the Sedition Act 1948. In delivering her judgment, Tengku Maimun Tuan Mat JCA (as Her Ladyship then was) referred to the Federal Court decision in *Fan Yew Teng v. PP* [1975] 1 LNS 38 FC.

[64] The issue of defective charge was canvassed in *Fan Yew Teng v. PP* [1975] 2 MLJ 235. This issue was dismissed by the Federal Court wherein Lee Hun Hoe CJ (Borneo) said:

> The fourth ground of appeal is that the appellant was given insufficient particulars of the offence alleged against him and, therefore, the charge was bad in law. Mr. Karpal Singh argued that as s. 3(1) of the Sedition Act 1948 specifies six different kinds of seditious tendencies, the prosecution should have specified in what way the publication complained of was seditious, and that

A failure of the prosecution to do so embarrassed the appellant and rendered the charge bad in law. He referred to a specimen charge at p. 317 of *Ratanlal's Law of Crimes*, 22nd edition, under s. 124A of the Indian Penal Code. He also cited *Lim Beh v. Opium Farmer, Public Prosecutor v. Lee Pak* and *Pek Tin Shu v. Public Prosecutor.*

B With all due respect, we do not think that there is any merit in this argument. The forms of charges set out in *Ratanlal's Law of Crimes* merely serves as a general guide and bear no relation to any particular set of facts. The offence of murder is committed only if there was present intention or knowledge of the kinds mentioned in ss. 299 and 300 of the Penal Code, and yet when a person is C charged with murder, it is unnecessary for the prosecution to specify in the charge the particular intention or knowledge set out in the two sections on which it relies, and indeed it can shift its ground during the course of the prosecution. In our judgment, in a prosecution under s. 4(1)(c) of the Sedition Act 1948, it is equally unnecessary for the Public Prosecutor to specify in the charge on D which of the six tendencies set out in s. 3(1) he relies and that it is open to him during the course of the trial to pick and choose.

[65] Guided by the above decision of the Federal Court, I similarly dismissed the issue of defective charge as being devoid of any merit.

E **[27]** In *PP v. Mohamad Sabu* (*supra*) the High Court held that there was a failure by the prosecution to state the ingredients of offence for criminal intimidation under s. 499 of the PC and that failure rendered the charge defective:

[23] Thus according to the accused, both charges are fatally flawed in that F they did not incorporate the essential ingredients of the offence under s. 499 of the Penal Code that resulted in depriving the Accused of knowing the case he has to face precisely.

[24] In *Ratanlal & Dhirajlal's Law of Crimes,* 25th edn, a sample charge under the equivalent ss. 499 and 500 of the Indian Penal Code ("sample charge") reads as follows at 2569:

G I (name and office of magistrate, etc.) hereby charge you (name of accused) as follows:

That you, on or about the __ day of __ defamed AB, by making or publishing to CD a certain imputation concering the said AB, to wit __ (state the defamatory matter), by means of spoken words H (or writing or signs or visible representations), intending to harm, (or knowing or having reason to believe that such imputation would harm) the reputation of the said AB; and thereby committed an offence punishable under section 500 of the Indian Penal Code, and within my cognisance.

I And I hereby direct that you be tried on the said charge.

> [25] By direct comparison of the Sample Charge with both the charges, it is plain to me that both charges are deficient in certain material particulars that form the basis of the offence committed by the Accused. With regard to the Main Charge, the precise identity of the person(s) harmed is not disclosed. The accused was hence unfairly left to guess what or who exactly he had allegedly defamed and to prepare his defence accordingly. As to the Alternative Charge, it is not disclosed that PC37 Constable Marin Abu Bakar Daud, PC8600 Constable Jaafar bin Hassan and PC7625 Yusoff Rono are dead as required by Explanation 1 to s. 499 of the Penal Code. I also observed the *mens rea* that is specified in the Alternative Charge is of the Accused knowing that his political speech will injure the reputation of the three police officers and their family. It is my view that the *mens rea* as specified will not support the offence because the *mens rea* must be intending to hurt the feelings (not reputation) of the family since the police officers are ail deceased besides also injuring the reputation of those officers (if living)
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> ...
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> [28] Upon careful scrutiny of both the charges as framed, it is my view for the reasons stated in para. 25 above that they are defective in substance and not merely form or inadequate particulars. They hence do not disclose any offence. Put simply, they are bad in law. In the circumstances, this is *per se* sufficient to dismiss the appeal.

[28] On the other hand, in the case of *Ab Malek Atan v. PP*, Augustine Paul J (as he then was), held that it was not necessary to state in the charge under s. 375 of the PC for the offence of rape the specific act listed therein as all the different acts referred to the same act of having sexual intercourse without the consent or will of the victim:

> ... Section 152(2) of the CPC clearly stipulates that if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only. On the other hand, s. 152(3) of the CPC provides that there is a need to state so much of the definition of the offence as to give the accused notice of the matter with which he is charged if the law which creates the offence does not give it any specific name. In this regard, I refer to *Krishnan & Anor v. Public Prosecutor* [1981] 2 MLJ 121 where Salleh Abas FJ (as he then was) said at p. 122:
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> > One of the rules relating to the framing of charges is that where the law does not give any specific name to the offence with which an accused person is charged, it will be sufficient for the prosecution to state in the charge so much of the definition of the offence as will give notice to the accused of the matter with which he is charged (s. 152(111) of the Criminal Procedure Code).
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> It follows that where an offence is given a specific name, it is sufficient to describe the offence in the charge by that name only. This is so even if the specific name given may incorporate several circumstances in which the offence may be committed. In explaining the operation of this rule, I consider it pertinent to refer to the *AIR Commentaries on The Code of Criminal Procedure* (7th Ed) (Vol 2) at pp 562 to 563:

> Where an offence has a name given to it by law such as 'rioting' 'theft', etc, the court may describe it by its name only. Thus, in a charge under s. 147 of the Penal Code, where the word 'rioting' is included in the charge, the words 'by force or by show of force', need not be included because the suggestion of force is contained in the word 'rioting'. Similarly, it is open to the prosecution to charge abetment generally and then, if the evidence did not establish abetment other than in one particular form, to rely on this particular form for a conviction. The charge will amount to notice to the accused that he will have to meet a case of abetment in one or more of the different ways indicated in s. 107 of the Penal Code. ... Where it is stated in the charge that the accused had caused 'grievous hurt', the specification of the various clauses in s. 320 of the Penal Code is unnecessary because the mention of the name 'grievous hurt' gives notice to the accused that he will have to meet a case in one or more of the different ways mentioned in s. 320 of the Penal Code. The court has, however, a discretion to give further details according to the facts and circumstances of each case. Where further details are given, they should be fully and accurately stated and should be such as to give the accused clear notice of the accusation against him. If the particular? clause, etc, of the section is specified in the charge, the prosecution is not entitled to rely on a different clause of that section because in that case, the accused is not expected to meet a case under any clause other than the one mentioned in the charge.
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> In the light of the provisions of law that I have referred to, the argument advanced by learned counsel can only be sustained if the offences with which the accused has been charged have not been given a specific name. It must be observed that the law under which the accused has been charged is only the punishable provision. It is s. 375 of the Code which creates the offence of rape ...
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> ...
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> Pursuant to s. 375 of the Code, a man who has sexual intercourse with a woman under any of the circumstances enumerated therein is said to commit 'rape'. Sexual intercourse under any of the prescribed circumstances has thus been given the specific name of 'rape'. The corollary is that an offence of rape may be described in the charge by that name only. It is therefore not necessary to identify the specific limb of s. 375 of the Code under which the case of the accused falls. In the circumstances, the charges preferred against the accused are not defective. When this process of reasoning was explained to learned counsel he conceded with charm and grace. I ruled that this ground cannot be sustained.

[29] The next two decisions are directly relevant to this trial as they similarly involve charges under s. 3(1) of the Act. Firstly, in *Mohd Zhafri Abu Baker* (*supra*), the High Court held that the inclusion of the two different acts under s. 3(1) of the Act that constitute the act of kidnapping had prejudiced the accused and therefore, was defective:

[19] The charge specifies the offence as having been committed on 30.06.2017 at about 9:00 pm in the vicinity of the Masjid Jamek LRT Station. Based on the charge, the constituent ingredient of the offence of kidnapping in the present case must be that of "abduction". There was no evidence led by the prosecution to prove either "wrongful restraint" or "wrongful confinement" on the date and time in question and at the place specified in the charge.

[20] Unfortunately, the sense of words employed by the prosecution in the charge proffered against the accused are cloudy and misleading to the extent that the accused are severely prejudiced in their defence. In the charge, the prosecution uses the following words:

(a) ... telah menahan seorang perempuan ..., and

(b) ... dengan melarikan Nila Akter Eti secara salah ... .

[21] The offence under s. 3 of the Kidnapping Act 1961 is concerned with the ingredient of either abduction, wrongful confinement or wrongful restraint, of the person so held for ransom. The prosecution, by describing the offence in the charge as both "menahan" ("confinement") and "melarikan ... secara salah" ("abduction"), had caused the accused to be misled and prejudiced in their defence.

[22] Clearly the charge is defective and could not be spared by virtue of s. 156 of the Criminal Procedure Code neither could it be cured under s. 422 of the same Code. The charge as framed by the prosecution tantamount to giving the accused notice of two distinct ingredients of the offence which could not, in law, co-exist, namely that of wrongful confinement and abduction. As such, the accused have been seriously misled by the error in specifying the correct ingredient of the offence of kidnapping in the charge and that error had caused a substantial miscarriage of justice. The accused persons have been deprived of the right to know exactly the charge for which they are called upon to answer.

[30] By contrast, in *Jeffri Abdullah v. PP* (*supra*), the Court of Appeal held that the manner the charge was drafted in that case did not cause any confusion to the accused:

[13] Learned counsel for the third appellant submitted that the charge was defective and not curable under s. 422 Criminal Procedure Code. The charge incorporated two elements of *actus reus* namely, "menahan" (restraint) and "melarikan secara salah" (abduct). Learned counsel argued that the appellants needed to know precisely whether they were facing a charge of abduction or wrongfully restraining SP7 so that they could properly prepare their defence: see *Goh Keat Peng v. PP* [2001] 2 CLJ 498 ...

[17] The first, second and third appellants were jointly charged with intent to hold SP7 for ransom, wrongfully restraining (menahan) SP7 by way of abducting him (dengan cara melarikan secara salah) in furtherance of common intention, an offence under s. 3(1) of the Act read with s. 34 of the Penal Code. The charge in the instant case is not defective in law as

A the phrase "dengan cara melarikan secara salah" is merely to explain or provide particulars of the wrongful act of "restrain" ("menahan"). The appellants were represented by learned counsel and they were neither misled nor prejudiced and no miscarriage of justice had been occasioned against the appellants.

B **[31]** Now, having referred to all those decisions and after carefully analysing them this court forms the view that the different acts listed in s. 3(1) of the Act are ingredients of the offence of kidnapping as they separately and distinctly describe the acts that establish the offence. Since each of those acts carry their own distinct definitions under the PC the C burden of proving and rebutting each of those act rest upon different legal and factual considerations. Therefore, without identifying the particular act the offence cannot be said to be properly stated in the charge. An accused person is entitled to know with certainty which of the act that the prosecution intends to rely in proving its case against him. The prosecution therefore has the duty to state in the charge which of the act of kidnapping the accused D person is accused of committing. This court therefore takes the same position on the matter as decided by the High Court in *Mohd Zhafri Abu Baker* (*supra*).

[32] The decisions in *Karpal Singh Ram Singh* (*supra*) and *Fan Yew Teng* (*supra*) should be distinguished on the basis that the seditious tendencies are E not included in the body of s. 4 of the Sedition Act 1948 which provides for the offence but are listed separately under s. 3(1) of the same Act and as the description suggests, they are tendencies or examples of types of seditious acts. In this court's view if they were intended to be ingredients of the offence then those tendencies would have been included in s. 4 of that Act. It must be stated that there was no full discussion either in *Karpal Singh Ram Singh* F (*supra*) nor *Fan Yew Teng* (*supra*) whether the particulars listed in s. 3(1) of that Act are ingredients of the offence or just particulars of the charge. However, in this court's opinion the view expressed by Lee Hun Hoe CJ (Borneo) suggested them not to be ingredients of the offence. On that basis, as decided by the Federal Court, the prosecution can choose to prove any of G those tendencies in the course of the trial.

[33] The decision in *Ab Malek Atan* (*supra*) should also be distinguished on the basis that the offence of rape as provided under s. 375 of the PC essentially involves only two elements that is sexual intercourse and that the sexual intercourse was done without the consent or against the will of the H victim. Thus, any type of act that involves those elements are rape. For that reason, His Lordship Augustine Paul J (as he then was) held the view that the failure to state in the charge which of the different acts under s. 375 of the PC was to be proven against the accused did not materially affect the validity of the charge as they all involved the same elements of the offence I of rape that is sexual intercourse without consent or free will. Now, in comparison the same cannot be said for s. 3(1) of the Act as the three acts of kidnapping are distinct and involves different elements that are subject to different legal and factual burdens of proof.

[34] The decision in *Jeffri Abdullah v. PP* (*supra*) must also be set apart from the present case as the charge there had identified the act of wrongfully restrain as constituting the offence of kidnapping but here there was no mention of any act at all in the charge.

[35] For those reasons, this court disagrees with the prosecution that the Court of Appeal decision in *Sundar Subramaniam* (*supra*) is supportive of the legality of the charge in this trial just because the charge in that case was drafted in the same manner. It must be said and stressed that in *Sundar Subramaniam* (*supra*) the legality of the charge did not come into question and therefore it cannot serve as a binding judicial authority on the issues raise in this trial.

Conclusion And Finding

[36] In conclusion, this court finds that the prosecution had failed to state in the charge an ingredient of the offence of kidnapping under s. 3(1) of the Act when it failed to specify which of the acts provided thereunder that the prosecution intended to prove against all the accused. It was not available to the prosecution to merely name the offence without describing specifically the act that all the accused were accused of committing. Section 3(1) of the Act have expressly stated three distinct and separate acts of kidnapping and any one of them is an essential ingredient in proving the offence of kidnapping. For that reason, it was not open to the prosecution to choose and prove the relevant act in the course of the trial. The charge was therefore defective and a nullity.

[37] Sections 156 and 422 of the CPC cannot aid the prosecution as this not a situation where there was an error in stating the offence or the particulars required to be stated in a charge. The omission goes to the root of the charge and hence there does not arise for consideration the question of whether all the accused persons were misled by that error or omission. The fact that each of the accused was represented by counsel at the trial did not mitigate the prosecution's failure. The accused persons were entitled to take advantage of the prosecution's failure at the end of the prosecution's case.

[38] It would be pertinent to quote Abang Iskandar JC (as he then was) in *PP v. Uthaya Kumar Ponnusamy & Ors* [2011] 1 CLJ 360 where His Lordship held:

> [7] The purpose of a charge, to my mind, is primarily to ensure that a person who is being accused of a criminal offence, is given due notice of the offence as mentioned in the charge. Invariably, in most cases, it defines what the offence is all about. Generally, in doing so, the charge bears out the essential ingredients of the offence contained in the charge and in so doing, the accused is given the earliest legal notice that his impugned conduct has come to be within the legal sphere of a definitive criminal offence. In the case of *Lim Beh & Ors v. Opium Farmer* [1842] 3 Ky

110, the accused was convicted on a charge framed as 'infringing the Opium Regulation.' The accused appealed on the ground that the charge preferred against him was vague. The High Court agreed and said:

> If there be one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may know with what he is charged and may be prepared to answer the charge in the best way.

[8] So, in the main, a charge is about the notification of the legal elements of the offence which the accused has the right to know in order that he will be able to prepare his defence and be prepared and ready to usefully face the charge during trial. If a charge does not sufficiently bear out the essential feature(s) of the offence, it may become a charge for an offence that is not known in law, and as such it becomes liable to dismissal by the court because it is then a groundless charge and that the accused has been embarrassed in the preparation of his defence. A groundless charge may be dismissed under s. 173(g) CPC.

[9] To my mind, a defence is embarrassed not so much for want of particulars (unless the particulars are necessary to describe the offence), but rather because the charge is not properly framed so as to omit mentioning any of the legal ingredients or elements that constitute the offence (emphasis added), or in putting into a charge such a description of the impugned conduct that actually amounts to a duplication. That, in a nutshell is the true purpose of a charge.

[10] There is no denying that a charge is a very vital and important first step in a criminal prosecution. In reality, once a charge is filed, it sets the criminal prosecution into motion. Mere errors in the charge are not inevitably fatal as long as such errors have not occasioned a failure of justice to the accused person. What the law requires of a charge is that it must give sufficient notice to the accused person so as to enable him to prepare his defence. A perfect charge, if indeed a charge could be described as such, is one that fulfils within its parameters, all the legal requirements pertaining to the offence with which it is concerned, so as to facilitate reasonable preparation of the defence on the part of the accused person.

Decision

[39] On the basis that the charge was defective and a nullity, the first, second, third, fourth, fifth and sixth accused are thereby discharged and acquitted of the offence of kidnapping one Taiful Islam.

Post Script

[40] In the course of completing these grounds of judgment the Court of Appeal had released its grounds of judgment in *Dhivyaprabu Panir Selvam v. PP* [2022] 1 LNS 1088. One of the issues that arose for consideration by

the court was whether there was a failure in clearly electing under which of the limb of s. 300 of the PC the offence of murder was proven. In delivering the decision of the court, Ahmad Nasfy JCA stated:

> [44] Prior to the commencement of the trial, the prosecution asserted through its opening speech (Exhibit P3) that it would be relying on limbs (a) or (d) of s. 300 in proving the case against the Appellant. Though it may not be binding on the prosecution, to our mind such statement carries significance as the opening speech would provide a guide on the evidence which would be led during the prosecution case, and also as an indication or notice to the Appellant on the case that would be proved against him. Instead, we find after closing its case, the prosecution altered its position and relied instead on s. 300(a) and (c) of the Penal Code as in its written submission. At the end of the prosecution case, the learned trial judge found that the prosecution had successfully proven a *prima facie* case against the Appellant. In arriving at such finding, the learned trial judged held that all the limbs of s. 300 were successfully proven by the prosecution.
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> [45] It is our *considered view that such course of conduct in not electing a particular limb of s. 300 is unjust and would deprive the Appellant of a fair trial. This is because the exceptions housed under s. 300 cater for different circumstances. More pertinently, it contained different elements required to be proven to turn mere culpable homicide into the more aggravated offence of murder. Eventually, the evidence required to be proved for each exception and the corresponding evidential "burden" on the accused to raise a reasonable doubt on such exception would also be different. As such the court must not only make an election on the applicable limb, but such election must also be made known to the accused – see Fong Kong Meng & Anor v. PP* [2019] 9 CLJ 301. (emphasis added)

[41] In this court's view, the Court of Appeal's decision support's this court's decision in holding that the prosecution had the duty to clearly choose and state which of the acts under s. 3(1) of the Act the prosecution intended to rely on in proving the offence of kidnapping and the failure in discharging that duty prejudiced all the accused.